(3)

No. 90-641

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

REGINALD G. ADDISON,
KAREN E. KOSKOFF,
RALPH J. PERROTTA,
JOANNE D. SLAIGHT,
SUPERIOR COURT TRIAL LAWYERS ASSOCIATION,
Petitioners

v.

FEDERAL TRADE COMMISSION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF AUTHORITIES

Cases: Page

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The FTC argues that the Order does not overly restrict First Amendment freedoms because it applies only to *agreements* to discourage, encourage, suggest, or advise. But that is no comfort to an elected official who necessarily consults with or communicates through aides. Nor is it much solace to a law school dean who agrees to meet with a delegation of lawyers, knowing that his disinterested advice will be passed back to a larger group, and that the FTC might later seek to infer an implied understanding that the larger group would be so advised. If the FTC is only interested in restricting incitement of imminent lawless conduct (Brief In Opposition at 9), it

should not prohibit as it has a broad range of speech, some of which could be deemed to reflect concerted action not undertaken to incite but rather to influence.

The FTC seeks to uphold the Order because it applies only to concerted action. As this Court has observed, however, collective speech, too, has a value: "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981). Reliance on *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697 (1978) for the proposition that a remedial Order may in some instances curtail the exercise of liberties is also misplaced. The Order in *Professional Engineers* was directed against the adoption of *official* opinions, policy statements, or guidelines stating that competitive bidding was unethical, and the avenue of petitioning for modification of the decree before such formal adoption was a practical alternative. *Id.* at 697, 699. The right to seek such modification is no help, of course, in the case of a wholesale ban on casual speech by politically concerned individuals and association members, some of whom do not even have an economic stake in the outcome.

The FTC suggests that the Constitutionality of the Order can be determined "in a concrete factual setting." This is no answer to an order that hangs threateningly over the heads of politically concerned individuals of limited financial resources—or, for that matter, to a group of such individuals. *See, e.g., Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965) (deterrence to protected speech is not effectively removed if "the contours of regulation would have to be hammered out case-by-case—and tested only by those hardy enough to risk [sanctions] to determine the proper scope of the regulation.") Nor it is any comfort that the Commission's opinion accompanying the Order may have *said* it was properly tailored and no broader than necessary (Brief in Opposition, at 8-9).

The Order *itself* is an overbroad and unnecessary limitation on political speech.[1]

Contrary to the FTC's assertion in its Opposition, the Court of Appeals' unpublished decision, by reinstating a remedial order which is broader than necessary to establish the desired end, does indeed conflict with decisions of this Court. *See, e.g., Hess v. Indiana*, 414 U.S. 105, 108 (1973) (speech can only be limited when it is directed to inciting or producing imminent lawless conduct); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (limitations on the First Amendment's guarantees will not be sustained when the desired end can be more narrowly achieved). Petitioners therefore respectfully urge that this Court exercise its supervisory powers.

Respectfully submitted,

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[1] The FTC betrays its own concern with the scope of the Order when it takes pains to assure that the Order is not intended to abridge First Amendment rights.